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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 769

TOM E. RODGERS,

Petitioner,

vs.

BALTIMORE & OHIO RAILROAD CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether the exclusive remedy of a stowman or freight handler against his railroad-employer for injuries sustained in the course of his employment on a vessel in the navigable waters of the United States is provided by the Longshoremen's and Harbor Workers' Compensation Act.

Statutes Involved

The statutes involved are the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., 44 Stat. 1424 and the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., 35 Stat. 65, 53 Stat. 1404.

Argument

The facts as presented to the District Court and the Circuit Court of Appeals establish a clear case within and governed by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

At the time of the accident involved, petitioner was an employee of respondent railroad engaged in loading cars on a carfloat, a vessel of more than 18 tons, owned by respondent and moored to a pier in navigable waters of the United States. Petitioner was not a master or a member of the crew. Respondent had secured payment of compensation benefits for its employees entitled thereto under the provisions of the Compensation Act. Respondent had furnished and petitioner had accepted compensation benefits and medical care under the Act.

Petitioner brought the action in the District Court for the Southern District of New York, claiming under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. that the injuries were due to his employer's negligence, not the unseaworthiness of the vessel.

On motion of respondent and the undisputed facts the District Court dismissed for lack of jurisdiction, holding the action barred by the Compensation Act and petitioner's remedy limited to the benefits provided under that Act (petition pp. 7-9).

The Circuit Court of Appeals, Second Circuit affirmed on the authority of *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334 (1952). (Court of Appeals opinion, omitted by petitioner, printed in respondent's Appendix A.)

In the *O'Rourke* case the Court, referring to the background of the Compensation Act, said at p. 337:

> "The resulting federal statute took the form of a compensation act to assure injured employees who were not seamen a prompt and certain recovery, rather than an employer's liability statute, such as was extended in 1920 to seamen by the Jones Act, 38 Stat. 1185, 46 U.S.C. § 688."

Reed v. *The Yaka*, 373 U.S. 410 (1963) did not overrule *Pennsylvania* v. *O'Rourke*. The holding in the *Reed* case is that a longshoreman is not barred by the Longshoremen's and Harbor Workers' Compensation Act from relying on his employer's liability as a ship owner *pro hac vice* for a ship's unseaworthiness in order to support his libel *in rem* against a ship. The petitioner, however, is not proceeding *in rem* against the vessel nor does he claim that the vessel was unseaworthy.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: February 10, 1964

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 79—September Term, 1963.

(Argued October 18, 1963 Decided October 18, 1963.)

Docket No. 28158

TOM E. RODGERS,

Plaintiff-Appellant,

—v.—

BALTIMORE & OHIO RAILROAD CO.,

Defendant-Appellee.

Before:

WATERMAN, HAYS and MARSHALL,

Circuit Judges.

Appeal by plaintiff below from the grant of defendant's motion for summary judgment, United States District Court for the Southern District of New York, Dawson, *J.* Affirmed.

JACOB RASSNER, New York City, *for Plaintiff-Appellant.*

ALEXANDER & GREEN (Donald M. Dunn, Alfred C. Moran, of counsel), New York City, *for Defendant-Appellee.*

PER CURIAM:

We affirm the judgment below in open court.

From the testimony of plaintiff in his deposition below it is clear that the accident suffered by him occurred under such circumstances that his sole and exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act. The complaint below alleged jurisdiction by virtue of the Federal Employers' Liability Act. Thus, the motion for summary judgment was properly granted. *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334 (1952).